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82-133

No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

SHASHIKANT NARANBHAI PATEL AND HASUBEN SHASHIKANT PATEL,

PETITIONERS,

V.

IMMIGRATION AND NATURALIZATION SERVICE

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

HARRY J. JOE
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QUESTIONS PRESENTED

1. Whether the Respondent misapplied 8 C.F.R. § 212.8(b)(4) and erred in determining that the male Petitioner had not proved that he had invested or was actively in the process of investing over $10,000.00 in commercial enterprise when (i) Petitioner had established a fixed committment to invest the requisite amount through an oral contract to borrow the funds and (ii) actually repaid the loan within three months of the loan agreement and previous to a hearing on the issue.

2. Whether the Respondent abused its discretion in denying the Petitioners' applications for adjustment of status to that of lawful permanent residents when the facts of the case did not indicate a finding of pre-conceived intent supported by reasonable, substantial, and probative evidence.

3. Whether the Petitioners have been denied due process and fundamental fairness by the failure of the Immigration Judge to provide a true and complete transcript of the deportation hearing in that the transcript . . . provided was replete with notations of inaudible, unintelligible, and no answer.

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SHASHIKANT NARANBHAI PATEL
AND HASUBEN SHASHIKANT PATEL,
PETITIONERS,

V.

IMMIGRATION AND NATURALIZATION SERVICE
RESPONDENT

Mr. Harry J. Joe, on behalf of Shashikant Naranbhai Patel and Hasuben Shashikant Patel, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The judgment of the Court of Appeals (App. A., infra, p. A-1) is not reported. The opinion of the Board of Immigration appeals (App. B, infra, pp. B-1 thru B-6) is not reported. The opinion of the Immigration Judge (App. C., infra, pp. C-1 thru C-7) is not reported.

This Honorable Court on June 8, 1982, granted an Order Extending Time To File Petition for Writ of Certiorari (Appendix E, infra, p. E-1).

JURISDICTION

The judgment of the Court of Appeals (App. A, infra, p. A-1) was entered on March 19, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. Fifth Amendment to the United States Constitution provides in relevant part:

No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

2. Immigration and Nationality Act of 1952, *as amended*, § 212(a)(14), 8 U.S.C. § 1182(a)(14) specifies:

> (a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
>
> > (14) Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that (A) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of aliens who are members of the teaching profession or who have exceptional ability in the sciences or arts), and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages, and working conditions of the workers in the United States similarly employed. The exclusion of aliens under the paragraph shall apply to preference immigrant aliens described in section 1153(a)(3) and (6) of this title, and to nonpreference immigrant aliens described in section 1153(a)(8) of this title;

3. Immigration and Nationality Act of 1952, *as amended*, § 245(a), 8 U.S.C. 1255(a) specifies:

> The status of an alien who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.

4. 8 C.F.R. § 212.8(b)(4) prior to October 7, 1976 provided in part:

> (b) The following persons are not considered to be within the purview of section 212(a)(14), 8 U.S.C. § 1182(a)(14), of the Act and do not require a labor certification:
>
> > (4) an alien who establishes on form I-526 that he is seeking to enter the United States for the purpose of engaging in a commercial or agricultural enterprise in which he has invested, or is actively in the process of investing, capital totalling at least $10,000, and who establishes that he has had at least 1 year's experience or training qualifying him to engage in such enterprise . . ."

5. 8 C.F.R. § 242.15, effective December 19, 1961 provides:

> The hearing before the special inquiry officer, including the testimony, exhibits, applications and requests, the special inquiry officer's decision, and all written orders, motions, appeals, briefs, and other papers filed in the proceedings shall constitute the record in the case. The hearing shall be recorded verbatim except for statements made off the record with the permission of the special inquiry

officer. In his discretion, the special inquiry officer may exclude from the record any arguments made in connection with motions, applications, requests, or objections, but in such event the person affected may submit a brief.

STATEMENT

The Petitioners are husband and wife and last entered the United States together as nonimmigrant visitors for pleasure on August 22, 1976. The male Petitioner is a native of Kenya and a citizen of Great Britain. His wife is a native and citizen of India. Petitioners had been granted landed immigrant status in Canada and were visiting the United States with the intention of continuing to Canada to reside as immigrants. They brought with them from the United Kingdom two nonnegotiable bank drafts totalling 6,554 pounds that could not be quickly converted into cash.

While in California, the Petitioners were introduced to one R. V. Patel who had been in Dallas, Texas arranging for the purchase of some motels for the principal, Mr. Dahya, in London. Mr. Dahya apparently had only $14,000.00 to invest so R. V. Patel solicited the male Petitioner as a possible investor in the motels. Having aroused the interest of the male Petitioner, said Petitioner travelled to Dallas, examined the property, and determined that it would be a good investment.

The Petitioners retained an attorney in Los Angeles and filed an application for adjustment of status under § 245 of the Immigration and Nationality Act of 1952, *as amended*, 8 U.S.C.A. § 1255 (West Supp. 1981) on October 4, 1976. This application was subsequently denied by the District Director of the Immigration and Naturalization Service at Dallas on November 1, 1978. That application was then renewed before the Immi-

gration Judge in the instant deportation proceeding on November 30, 1978, pursuant to 8 C.F.R. § 242.17 (1981).

After deciding to purchase the motels in Dallas, the Petitioner needed to prepare for financing. As his bank drafts were not readily convertible to cash the Petitioner deposited them in a joint account with his wife and the brother of R. V. Patel, Mr. A. V. Patel. R. V. Patel then advanced Petitioner the funds necesary for the transaction in reliance on an oral promise that the money awaiting collection in the bank was now, in effect, Mr. R. V. Patel's money. Consequently, a partnership agreement between Mr. Dahya and the male Petitioner was drawn up on September 22, 1976 showing joint ownership of the motels and a capital contribution by each partner of $14,622.28. A warranty deed and vendor's lien was issued to the partners on September 15, 1976. A deed of trust and a promissory note for the properties was signed by the Petitioner on September 15, 1976. A signed receipt from the Southwest Land Title Company indicates that $25,429.56 was received from both Mr. Dahya and the male Petitioner on September 15, 1976.

On November 30, 1978, a deportation hearing was held in Dallas, Texas. The Immigration Judge found the Petitioners deportable and denied their applications for adjustment of status on the grounds that the Petitioners had not established that they qualified for such relief because the male Petitioner had not established that he qualified as an investor, and therefore exempt from the labor certification requirement of § 212(a) (14), 8 U.S.C. § 1182(a) (14), under 8 C.F.R.

§ 212.8(b)(4). The applications were also denied as a matter of discretion. Appeal was perfected to the Board of Immigration Appeals where the Immigration Judge's decision was affirmed. The B.I.A. held that the male Petitioner had not established that he was actively in the process of investing over $10,000.00 of his own funds as of October 4, 1976 and that the Petitioners had a pre-conceived intent to remain permanently in the United States when they entered and thus did not merit discretionary action.

An appeal to the United States Court of Appeals, Fifth Circuit, pursuant to § 106 of the Immigration and Nationality Act of 1952 *as amended*, 8 U.S.C. [1105(a) (West 1970), resulted in a per curiam affirmance of the Board of Immigration Appeals' decision.

REASONS FOR GRANTING THE PETITION

1. This case presents a clear example of the Immigration and Naturalization Service's misapplication and failure to follow their own regulations. The misapplication also results in a contradiction to Department of State interpretation. 8 C.F.R. § 212.8(b) (4) effective February 13, 1973, exempts from the labor certification requirement those aliens who are *actively in the process* of investing $10,000.00 in a commercial enterprise. (Emphasis supplied). In *Gill v. I.N.S.*, 666 F.2d 390 (9th Cir. 1982), the Court of Appeals reversed a Board of Immigration Appeals' (hereinafter B.I.A.) finding of ineligibility for investment status concluding that an impermissibly narrow construction of "actively in the process of investing" renders the regulation ineffectual. The Court of Appeals in *Hirunpidok v. I.N.S.*, 641 F.2d 778, 779-780 (9th Cir.

1981) found the critical inquiry to be whether the alien, at the time of his application, is pursuing an ongoing and systematic plan to invest the requisite amount.

In the case at bar the B.I.A. determined the alien to be ineligible for the exemption as an investor where the funds that he borrowed to invest were secured by an oral promise to repay as soon as his British bank drafts could be converted to cash. The B.I.A. said that there was no evidence of a fixed commitment by the Petitioner. In fact, there was a multitude of evidence represented by the presence of Petitioner's name on all of the real estate documents executed at closing. The Petitioner's lender, Mr. R. V. Patel, advanced the money. A firm commitment to repay had been made as evidenced by the fact that the British bank drafts had been used as collateral.

The B.I.A. was not saying that an investor cannot use borrowed funds; rather, the Board inferred that the loan cannot be based on an oral agreement because there is no evidence of such an agreement. This logic presupposes that an oral contract is unenforceable and therefore is not representative of a fixed commitment by the Petitioner. Under the law of the State of Texas, where the agreement took place, an oral contract is enforceable and "may be proved by circumstantial evidence, as well as direct evidence," 14 TEX. JUR. 3d Contracts § 353, p. 594 (1981), *Peters v. Norris*, 402 S.W. 2d 216 (Tex. Civ. App. 1966). The evidence in this case shows that an oral agreement was made and that approximately three months after the loan was made, and prior to an adjudication of the issue, the loan was repaid in full.

State Department Visa Bulletin Vol. V, No. 20 (1982), in reference to 8 C.F.R. § 212.8(b)(4), expressly limits acceptable investments made with borrowed funds to those in which "the alien is personally at risk for the funds in the event of business failure." Moreover, the bulletin expressly allows unsecured loans to be included in the investment. This is precisely the situation in the instant case where the Petitioner, by oral agreement, borrowed funds for which he was personally liable in the event of default.

In determining whether or not a nonimmigrant alien qualifies as a Treaty Investor under § 101(a)(15)(E)(ii) of the Act, the I.N.S. has adopted the policy of adhering to interpretations and tests used by the Department of State Consular Officers who issue such visas in determining whether or not the alien applicant qualifies as a nonimmigrant investor. The I.N.S. will look to the Foreign Affairs Manual as well as Department of State regulations for guidance when it is confronted with the same issue. *Matter of Udagawa*, 14 I. & N. Dec. 578 (1974).

The B.I.A. and the Court of Appeals for the Fifth Circuit have incorrectly adhered to an unduly restrictive interpretation of 8 C.F.R. § 212.8(b)(4) limiting the labor certification exemption to situations, in the case of borrowed funds, in which a written loan agreement has been executed. This interpretation is illogical and inconsistent with the words of the regulation as well as State Department directions to consular offices and officers who issue visas.

This Supreme Court has held that when the wording of a statute is clear and unambiguous, the statute

should be enforced acording to its terms and that there is no room for interpretive construction, *Caminetti v. U.S.*, 242 U.S. 470 (1917). Of course, deference is accorded to the interpretation given a statute by the officers or agency charged with its administration, *Udall v. Tallman*, 380 U.S. 1, 16 (1965). But, agency discretion cannot be exercised so as to conflict with the purpose of the applicable statute. *Cheung v. District Director, I.N.S.*, 641 F.2d 666 (9th Cir. 1980), and the agency's interpretation will not be upheld where it is plainly erroneous or inconsistent with the statute. *Curlott v. Hampton*, 438 F.Supp. 505 (D.Alas. 1977) *Aff'd in part and reversed in part*, 598 F.2d 1175 (9th Cir. 1979). The regulation in question provides the exemption to those "aliens . . . actively in the process of investing" in addition to those who have "invested." An interpretation which ignores this language or construes it as surplusage is clearly erroneous. *United States v. Marubeni America Corp.*, 611 F. 2d 763 (9th Cir. 1980).

2. The B.I.A. abused its discretion in denying the Petitioners' applications for adjustment of status on the basis of a finding that Petitioners had a pre-conceived intent to remain in the United States at the time of entry. When factual determinations are made by a representative of the Attorney General, such finding of fact must be supported by "reasonable, substantial, and probative evidence . . ." Immigration and Nationality Act, § 106(a)(4), *as amended*, 8 U.S.C. § 1105(a)(4) (West 1970). In *Tuan v. I.N.S.*, 521 F.2d 1337 (5th Cir. 1976), the Court of Appeals held that factual determinations of pre-conceived intent must be supported by reasonable, substantial and probative evidence.

The attenuated facts used by the B.I.A. to make their decision were subject to multiple interpretations and in no way could be termed substantial evidence. The Board found that:

> The interrelationships of the parties, combined with the agent's signing of a contract which he knew would require another partner, and the subsequent timing of the male Respondent's [petitioner herein] involvement in the transaction, strongly suggests that at the time the earnest money contract was signed on September 2, 1976, the agent was already aware of the male Respondent's desire to participate in the investment. (Appendix B, infra, p. 4).

The fact is that Petitioners had been in the United States for several weeks before examining the property in Dallas and could have easily entered into the contract themselves without requiring the agent to enter into the contract personally if they had so intended. Likewise, the Petitioners would not have brought non-negotiable bank drafts had they intended to make an immediate investment in the United States. Moreover, the Petitioners had been granted landed immigrant status in Canada at the time of entry to the United States and were going to Canada after a visit to reside there.

The evidence of pre-conceived intent is clearly lacking in reasonableness, substantiality, and probativeness. It is mere conjecture based on an Immigration and Naturalization Service bias towards Indian nationals named Patel. *See* Johnson, "Foreign-Planted Motel Roots Perplex I.N.S.," Dallas Morning News at 1, October 27, 1980, describing such prejudice.

3. The Petitioners have been denied due process and fundamental fairness by the failure of the Immigration Judge to provide a true and complete transcript of the deportation hearing to enable Petitioners to have a fair appeal, especially on the factually complex issue of pre-conceived intent.

An alien in deportation proceedings is entitled to a verbatim transcript of the deportation hearing, 8 C.F.R. § 242.15 (1981). This regulation was designed to protect aliens in deportation hearings, *U.S. V. Calles-Pineda*, 627 F.2d 976, 979 (9th Cir. 1980). The Immigration Judge has the primary responsibility to insure that the transcript of the hearing and record of proceeding submitted to the B.I.A. are orderly, complete, and accurate, *Matter of Charles*, 16 I. & N. Dec. 241 (B.I.A. 1977).

It has been held that "compliance with the regulations is an essential safeguard of an alien's right to due process." *Navia-Duran v. I.N.S.*, 568 F.2d 803 (1st Cir. 1977), and *Attoh v. U.S.*, 606 F.2d 1273 (D.C. Cir. 1979).

In the 128 pages of transcript for the present case there are 119 notations of "inaudible," 50 notations of "unintelligible," and 114 notations of "no answer." An overwhelming and extensive number of these notations deal directly with factual isues which were raised on appeal to the Court of Appeals for the Fifth Circuit, especially with respect to the Respondent's finding of pre-conceived intent.

In the instant matter the Petitioner needed to prove that it was his funds that were ultimately invested in the motels that were purchased by him in September

1976. It was a simple matter of tracing the funds from the sale of Petitioners' property in the United Kingdom to the United States in the form of bank drafts, through the bank in California to Mr. R.V. Patel who had loaned the money to the male Petitioner so that the transaction could be completed. It is respectfully contended that this was made immeasurably more difficult by the blatant inadequacy of the transcript.

The Fifth Amendment to the United States Constitution serves as a guarantee to aliens of procedural due process of law. *Chew v. Colding*, 344 U.S. 590, 73 S.Ct. 472, 97 L.Ed. 576 (1953). It is firmly settled that aliens are entitled in deportation proceedings to procedural due process including the right to a full and fair appeal. *Matthews v. Diaz*, 426 U.S. 67, 96 S.Ct. 1883 (1976). In reference to due process and the realm of administrative discretion in which agencies are free from supervision, Justice Cardozo exclaimed, "the inexorable safeguard * * * of a fair and open hearing [must] be maintained in its integrity, *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U.S. 292 (1937). See *The Japanese Immigrant Case*, 189 U.S. 86, 23 S.Ct. 611 (1903).

When there are serious problems with the transcript of [a] deportation hearing the case should be remanded to the Immigration Judge for a *de novo* hearing, *Matter of Kallenberger and Kallenberger*, A20 969 651, A21 582 309, (unpublished decision of the B.I.A., May 6, 1980, App.D, infra, p. D-1 thru D-2). Petitioners submit that their rights to a full and fair appeal were denied by the omissions of the Immigration Judge.

Having been denied a right granted to them by the regulations and the administrative case law, and having been prejudiced thereby, the Petitioners contend that this case should be remanded for a trial de novo to insure the creation of an orderly, complete, and accurate record.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,
JOE, ROBERTS & ALLEN, P.C.

By: HARRY J. JOE

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IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

NO. 81-4244

SHASHIKANT NARANBHAI PATEL AND
HASUBEN SHASHIKANT PATEL,

Petitioners,

vs.

IMMIGRATION & NATURALIZATION SERVICE

Respondent.

Petition for Review of an Order of the
Immigration & Naturalization Service

(March 19, 1982)

Before THORNBERRY, REAVLEY and
RANDALL, Circuit Judges. PER CURIAM:

AFFIRMED. See Local Rule 21.

B-1

United States Department of Justice
Board of Immigration Appeals
Washington, D.C. 20530

MAY 28, 1981

Files: A22 373 521 — Dallas
A22 373 522

In re: SHASHIKANT NARANBHAI *PATEL*
HASUBEN SHASHIKANT *PATEL*
IN DEPORATION PROCEEDINGS
APPEAL

ON BEHALF OF RESPONDENTS: Steven D. Karp, Esquire
Bert D. Greenberg, Inc.
8484 Wilshire Boulevard, Suite 730
Beverly Hills, California 90211

ON BEHALF OF SERVICE: Daniel L. Kahn
Trial Attorney

CHARGE:
Order: Sec. 241(a)(2), I&N Act (8 U.S.C. 1251(a)(2))—Nonimmigrant — remained longer than permitted (both respondents)

APPLICATION: Adjustment of status

The respondents appeal from the December 5, 1978, decision of the immigration judge finding them deportable as charged, denying their applications for adjustment of status under section 245 of the Immigration and Nationality Act, 8 U.S.C. 1255, but granting them the privilege of voluntary departure. The appeal will be dismissed.

The respondents are a husband and wife. The husband is a native of Kenya and citizen of Great Britain. His wife is a native and citizen of India. They entered the United States together as nonimmigrant visitors for pleasure on August 22, 1976. They were initially authorized to remain in the United

States until September 5, 1976. On October 4, 1976 the respondents sought adjustment of status as non-preference immigrants claiming exemption from the labor certification requirement of section 212 (a)(14) of the Act, 8 U.S.C. 1182(a)(14), based on the husband's alleged status as an "investor" within the meaning of 8 C.F.R. 212.8(b)(4).[1] On April 11, 1977, the District Director denied the adjustment applications. On November 1, 1978, the District Director declined to reconsider his denial. On November 6, 1978, the Service issued Orders to Show Cause against the respondents charging them with being deportable under section 241(a)(2) of the Act, 8 U.S.C. 1251(a)(2), as "overstayed" nonimmigrant visitors.

At deportation proceedings held on November 30, 1978, the respondents conceded deportability as charged. They renewed their applications for adjustment of status, again alleging exemption from the labor certification requirement based on the husband's claim to "investor" status.

In his decision dated December 5, 1978, the immigration judge denied the respondents adjustment applications for three separate reasons. He initially found that the respondents had not adequately established that they had invested or had been actively in the process of investing $10,000 prior to October 7, 1976, when the provisions of 8 C.F.R. 212.8(b)(4) were amended to required a minimum financial investment of $40,000. He further found that the respondents had failed to establish that their investments expanded job opportunities to citizens or lawful permanent residents of this country. *See Matter of Ruangswang*, 16 I&N Dec. 76 (BIA 1976), *reversed Ruangswang v. INS*, 591 F.2d 39 (9 Cir. 1978). The immigration judge finally concluded that the respondents were not deserving of adjustment of status in the exercise of discretion. He found that the respondents had had a preconceived intent

1. The investor regulations in effect on October 4, 1976, required that an alien invest, or be actively in the process of investing, capital totalling at least $10,000 in a commercial enterprise and establish that he had at least one year's experience or training to qualify him to engage in it. *See* 8 C.F.R. 212.8(b)(4), effective February 12, 1973. Effective October 7, 1976, 8 C.F.R. 212.8(b)(4) was amended to require an investment of at least $40,000 in an enterprise in which "he will be a principal manager, and that the enterprise will employ persons in the United States who are United States citizens or aliens lawfully admitted for permanent residence, exclusive of the alien, his spouse and children."

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to remain in this country permanently when they entered in August 1976 as nonimmigrant visitors.

The respondents appeal, contesting all three underlying bases for the immigration judge's denial of their applications.

Based on the chronology of events in this case and the evidence before us, we find that the record supports the conclusion that the respondents entered the United States with the preconceived intent to remain here permanently. The relevant facts as regards this issue are as follows: In 1975, the respondents were granted "landed immigrant" status in Canada. They visited Canada for some four or five weeks in 1975 and resided with relatives. They then returned to Great Britain and disposed of their property. The male respondent testified that when they left Great Britain in 1976, they intended to visit in the United States and then to go on to Canada. They therefore applied for and were granted nonimmigrant visitor visas. The respondents entered the United States at Seattle, Washington, on August 22, 1976. They then travelled to Los Angeles to visit with the female respondent's sister and brother-in-law. Some three weeks later (on September 14, 1976), the male respondent had already executed an "Application for Status as Permanent Resident" (Form I-485). An investor application (Form I-526), executed one week later, reflected that the respondent was seeking to be relieved from the labor certification requirement of section 212(a)(14) as an investor based on his claimed investment (as a 50% partner) in two motels in Dallas, Texas. It was indicated on the Form I-526 that some $29,000 had been invested in the motels.

The male respondent claimed at the hearing that he had no knowledge of the investment possibility when he entered the United States and that he had no intent at that time to seek an investment in this country. He claimed that while visiting his wife's brother-in-law's house in Los Angeles, the brother-in-law's brother suggested the possibility that he become a partner in the purchasing of the two motels. The brother-in-law's brother (hereinafter referred to as "the agent") testified that he was an agent for a principal in Great Britain who had some $13,000 to invest in a motel. The agent testified that on September 2, 1976, he had signed an earnest money contract

in Dallas to purchase the motels. The contract required some $25,000 in cash. The agent stated that he signed the contract knowing that he would need an additional partner. He claimed that he did so because he assumed that he would be able to come up with another partner prior to settlement. Both the agent and the male respondent alleged that when the agent journeyed to his brother's house in Los Angeles and met the male respondent the first discussions occurred about the respondent coming into the investment. These reportedly occurred during the first week to ten days of September 1976. The male respondent testified that he considered investing in the motels, but that at that point he still intended to journey on to Canda. He stated that he and his wife went to Dallas on September 13, 1976, and within a matter of two days he decided to become a partner in the investment. The motels were purchased on September 15, 1976. The male respondent alleged that it was not until some "ten or fifteen days after we brought the property" that he decided to remain in the United States as a permanent resident. The respondent testified that he had known the agent's principal in Great Britain for many years and that he had in fact seen him prior to his entry into the United States in 1976.

On the basis of the record before us, we are satisfied that the respondents entered the United States with the preconceived intent to remain here permanently. In this regard, we first note the chronology of events. The respondents entered on August 22, 1976, purportedly without any intent to remain here permanently or to invest in this country. Some three weeks later they had already travelled to Texas, purchased a motel, and filed applications for status as permanent residents. Secondly, we note that the agent who signed the earnest money contract to buy two motels on September 2, 1976, did so knowing that he needed another partner to come up with the money to add to his principal's $13,000 in order to finance the deal. He testified that he signed the contract because he anticipated being able to find a partner before the settlement date. The record indicates that at the time the agent signed the contract the respondent and his wife were staying with the agent's brother in Los Angeles. The record further reflects that the male respondent knew the agent's principal in Great Britain and had in fact seen him during the period that he was in England disposing of his property. The interrelationships of the parties, combined with the agent's signing of a

contract which he knew would require another partner, and the subsequent timing of the male respondent's involvement in the transaction, strongly suggest that at the time the earnest money contract was signed on September 2, 1976, the agent was already aware of the male respondent's desire to participate in the investment.

In face of the chronology of events and the nature of the relationships of all of the parties to the investment, in order to conclude that there was no preconceived intent, we would have to find the male respondent's testimony with regard to how the investment came about to be credible. The record, however, does not reflect this to be the case. Aside from the immigration judge's assessment of the male respondent's narration of events, we note that the male respondent claimed throughout the hearing that when he signed the documents to purchase the motels on September 15, 1976, he still intended to go to Canada and that his intention did not change until "ten or fifteen days" later. (Tr. p. 94-96). The record, however, documents that the male respondent had in fact *already* executed an "Application for Status as Permanent Resident" (Form I-485) prior to that date. A Form I-485 was signed by the male respondent on September 14, 1976. *See* Exhibit 3. Considering all of the circumstances of this case, we find that the record more than adequately evidences that the respondents entered the United States on August 22, 1976, with a preconceived intent to remain here permantly. We accordingly find that the applications for adjustment of status were properly denied in the exercise of discretion. *See Faddah v. INS*, 553 F.2d 491 (5 Cir. 1977). *See also Jain* v. *INS*, 612 F.2d 683 (2 Cir. 1979), and the cases cited therein.

We further concur in the immigration judge's conclusion that the respondents have not come forward with clear evidence that they had invested or were actively in the process of investing over $10,000 of their own funds as of October 1976. In this regard we note that contrary to the male respondent's representation on his "Request for Determination that Prospective Immigrant is An Investor" (Form I-526), dated September 22, 1976, he had *not* invested 50% of $29,244.56 in two motels as of that date. The funds invested in the motels were provided by an investor in Great Britain and by that investor's agent in Texas. The respondent and the agent claimed that it had been verbally agreed that the respondent would contribute one-half of the money invested when his funds became available. The agent stated that he was repaid some $14,600 by the male respondent on December 14, 1976.

There is, however, no documentary evidence to establish the claimed agreement nor is there any evidence to establish that the male respondent had a fixed commitment as of September 1976 to reimburse the agent for the funds he contributed to the purchase price of the motels. The record includes a photocopy of a cashier's check in the amount of some $14,600 issued on December 14, 1976, and payable to the agent, but the funds for the check came from a joint savings account in the names of the respondents *and* the agent's brother. There is nothing to establish that the money was either deposited by or specifically belonged to the respondents as opposed to the agent's brother or in fact the agent himself. The evidence that the respondents invested $10,000 of their own funds is far from unambiguous. *See Matter of Ahmad*, 15 I&N Dec. 81, 82-83 (BIA 1974). Further, it has not been adequately established (even assuming that the funds belonged to the respondents) that they had invested or were actively in the process of investing $10,000 before October 1976 so as to preserve consideration of their application under the $10,000 standard. *See Matter of Kumar*, Interim Decision 2777 (BIA 1980). *See also Matter of Khan*, 16 I&N Dec. 138 (BIA 1977).

We accordingly find that the respondents' applications for adjustment of status were properly denied.

ORDER: The appeal is dismissed.

FURTHER ORDER: The respondents are permitted to depart from the United States voluntarily within 30 days from the date of this order and under such conditions as the District Director deems appropriate; and in the event of failure so to depart, the respondents shall be deported as provided in the immigration judge's order.

David L. Milhollan

Chairman

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

File Nos: A22 373 521 — Dallas, Texas
A22 373 522

IN THE MATTER OF
SHASHIKANT N. PATEL
and
HASUBEN S. PATEL
RESPONDENTS

IN DEPORTATION
PROCEEDINGS

CHARGE: I & N Act of 1952 — Section 241(a)(2), (8 USC 1251 (a)(2)), Nonimmigrants, visitors for pleasure, remained longer

APPLICATIONS:

Adjustment of Status, under section 245 of the Act, as Investor within 8 CFR 212.8(b)(4); or

Voluntary Departure, under section 244(e) of the Act.

IN BEHALF OF SERVICE:

Daniel L. Kahn, Esq.
Trial Attorney (INS)
Houston, Texas

IN BEHALF OF RESPONDENTS:

Bert D. Greenberg, Esq.,
By: Ernest Sosnick, Esq.
8484 Wilshire Blvd.
Suite 900
Beverly Hills, Ca. 90211

DECISION OF THE IMMIGRATION JUDGE

DEPORTABILITY:

The respondents are husband and wife. The male respondent, Shashikant N. Patel, is a 37 year old native of Kenya and a citizen of the United Kingdom. The female respondent, Hasuben S. Patel, is a 38 year old native and citizen of India. Both had landed immigrant status in Canada.

Both respondents entered the United States on August 22, 1976. They were initially admitted to September 5, 1976.

At the deportation proceeding on November 30, 1978, respondents, through counsel, admitted all the allegations of fact, and conceeded deportability on the charge of being overstay visitors. Their respective orders to show cause are in evidence as Exhibits No. 1 and 1A.

Respondents are accordingly deportable as charged.

APPLICATION FOR ADJUSTMENT AS INVESTOR:

It appears that the date of receipt stamp on the Form I-485, (Exhibit No. 3), for Ms. S. N. Patel was October 2, 1976. That Application for Adjustment was based on, and filed in conjunction with Form I-526, claim for investor status, (Group Exhibit No. 2). Mrs. H. S. Patel's Form I-485 appears to be date stamped as received October 2, 1976 (Exhibit No. 2-A).

A Form I-526 is a request for a determination if an alien can be relieved from the labor certification requirement of section 212(a)(14) of the Act, (8 USC 1182(a)(14), under 8 CFR 212.8(b)(4). Even though denied by the district director, as in this case, respondent may reapply before the immigration judge.

The requirements for investor status under 8 CFR 212.8 (b)(4), in effect between February 12, 1973 and October 7, 1976 were:

> The alien must establish on the Form I-526 that he has invested, or is actively in the process of investing, capital totaling at least $10,000.00, and he must establish that he has had at least one years experience or training qualifying him to engage in such enterprise.

Respondent's Form I-526, signed by the male respondent on September 22, 1976 shows cash: $26,429.56, paid into escrow; other: $2,815.00 deposits for electricity, gas, water. Total: $29,244.56 * * * 50% partner (no partner was named on the Form I-526). Form I-526, at item 5 indicates the investment

was in the Ritz Motel and the Texas Motel, both situated in the 3800 block of West Davis Street in Dallas, Texas. There is an attachment in Exhibit No. 2 showing a partnership agreement entered into by Gordhan Dahya, of 32, Chandos Road, London N.W. 2, England. The agreement indicates that Shashikant N. Patel is of 3842 Davis Street (the adress of the Ritz Motel). Gordham Dahya's agent R. V. Patel, (a relative of respondent), signed the partnership agreement for Gordham Dahya.

Gordhan Dahya was not present in the United States at the time of the "agreement" September 22, 1976, not has he ever been in the United States.

There is testimony, not documented, that Dahya put up $14,622.28 for half the capital invested. It is the unsupported testimony of R. V. Patel that Mr. Dahya gave R. V. Patel the money to invest for Dahya.

On September 15, 1976, (a week before the partnership agreement), there is a deed of trust purportedly given by respondent S. N. Patel and Gordhan Dahya in consideration of $10.00, sold to Lawrence E. Steinberg Trustee, apparently for the Ritz and Texas motel properties.

In August, 1975 respondents became Landed Immigrants in Canada. They spent only 4 or 5 weeks in Canada. Then they returned to England and remained in England from about September 1974 to August 1976. Respondents have never returned to Canada.

Respondents went to the American Consul in London, England and obtained nonimmigrant visas, with the avowed purpose of a brief visit with relatives in Southern California before returing to Canada. They entered the United States at Seattle, Washington August 22, 1976 and were admitted until September 5, 1976.

Respondents sold their home in England before comming to the United States in August 1976. Neither respondent was ever employed in Canada, they owned no property there.

It is noted that the earnest money contract for the Ritz and Texas Motels, between Mary F. Knodle and the *sole* purchaser Gordhan Dahya, (by his agent R. V. Patel), was entered into September 2, 1976. The testimony of R. V. Patel was that he started the negotiations with the seller of the Ritz and Texas Motels in behalf of the alleged investor Gordham Dahya and allegedly some other "partner". When that other "partner"

backed out, he, R. V. Patel approached his relative, S. N. Patel (respondent) to interest him in becomming a "partner".

It is R. V. Patel's testimony that he owns motels in California. Indeed R. V. Patel acquired his permanent resident status via the investor route with the purchase of a motel in South Gate California. He was thus sucessful in bypassing the normal visa issuing process of applying before an American Consular officer aboard.

There is testimony that the alleged partner Gordhan Dahya is awaiting an immigrant visa to the United States based on his alleged investment in the Ritz and Texas Motels.

I have carefully reviewed the documents and the testimony, however I do not know whose money was really invested in the Ritz and Texas Motels on September 15, 1976. It may have been the money of Mr. Dahya, it might have been the money of R. V. Patel, it might have been anothers money, but it was *not* the money of respondent S. N. Patel.

See the Group Exhibit No. 6. Someone got a City National Bank of Beverly Hills, California Cashiers Check in the amount of $14,622.28, payable to R. V. Patel. This Cashiers Check is dated December 14, 1976.

Eight Code of Federal Regulations, section 212.8(b)(4) was amended with effective date of October 7, 1976. As of, or after, that date the alien must establish that he has invested or is actively in the process of investing, capital totalling at least $40,000 in a enterprise in the United States of which he will be a principal manager and that the enterprise will employ a person or persons in the United States of which he will be a principal manager and the enterprise will employ a person or persons in the United States who are United States citizens or aliens lawfully admitted for permanent residence, exclusive of the alien, his spouse and children . . .

Testimony of respondent S. N. Patel established that his alleged money was in an account in three persons names: S. N. Patel (male respondent), or H. S. Patel (female respondent), or A. V. Patel (a relative of the respondent). See Exhibit No. 4 — Passbook No. 013-13545-9.

At his United States entry, respondent S. N. Patel indicated he had a National Westminister Bank Limited draft of London, England in the amount of 4,000 Pounds, and another draft for 2,554 Pounds, That money was purportedly deposited in the bank account of S. N. Patel or H. S. Patel or A. V. Patel — Exhibit No. 4.

There was no withdrawal of funds of the respondent from that account until December 1, 1976, Exhibit No. 4.

A business venture or business investment involves a financial risk by the investor. To qualify as an investor one must establish that he has a legal obligation and has risked his own money.

Under 8 CFR 212.8(b)(4), in effect between February 12, 1973 and October 7, 1976, (during which period the 10,000 capital figure was applicable), respondent had risked no capital.

It was the testimony of S. N. Patel that he knew his alleged partner Gordhan Dahya (who has never been in the United States), from about 1965 or 1966, but he, respondent, first thought of going into business with him as of about September 13, 1976. Respondent S. N. Patel, said he had once hoped to be employed as a wireman in Canada, but was never employed in Canada. Respondents had no residence, no employment, and no property to return to in Canada. Respondent would have us believe it was only a series of coincidences: that within 21 days of his U.S. arrival he was looking at the Ritz and Texas Motels in Dallas with intent to buy them, that within 24 days after his arrival S. N. Patel signed a purchasers agreement to buy half interest in those motels.

Nonpreference visa numbers are not now available for natives of Kenya or India, however, such numbers were available in the month the Forms I-485 were filed.

See *Matter of Shaw*, I. D. No. 2525, (BIA, 1976). An accountant should be able to express an opinion, based on an audit that the applicant's money was actually invested in the business. There has been no audit of this business. The evidence establishes that if any of the respondent's money ever went into the Ritz and Texas motels it was in December, 1976 and did not amount to the then required $40,000 investment. Respondents S. N. Patel and H. S. Patel had no money invested in those motels until December, 1976.

The Ritz and Texas motels are about 20 years old.

In January 1977 the respondents allegedly invested in still another existing motel in Dallas, Texas. The later motel is the Stardust motel, it is about 14 years old. There is testimony that a permanet resident alien, one A. V. Patel, is a partner in the Stardust motel.

The Stardust motel is not mentioned on the Form I-526. In my view, the Stardust motel is an entirely new and separate investment and would require a new Form I-526, and separate Form I-485 application for adjustment. See *Matter of Jo*, I. D. No. 2412, (B I A, 1975). There is no way an investment made in 1977 (Stardust motel) can come within the $10,000 requirement which expired October 7, 1976. The evidence submitted in Exhibit 2 relates to the Ritz and Texas Motels. Exhibits 5 and 7 also relate to the Stardust motel acquired in 1977. This was apparently to bolster the effort to establish eligibilty under the defunct regulation. See *Matter of Hiedari*, I.D. No. 2581, (BIA, 1977).

Based on the testimony and documentary evidence I find the respondents have not shown that they had *any* risk capital invested under the investor regulation for a $10,000 investment prior to October 7, 1976. If a third party actually obligates his assets and then through a paper transaction, vests the alien with control at a later date, the alien has played a purely passive role in the transaction and cannot be said to have been actively engaged in making an investment. The purpose of the investor category is to provide a means for an alien with entrepreneurial talents and proclivities to immigrate to the United States on the basis thereof.

There has been no showing by respondent that he has ever put anywhere near $40,000 into the Texas and Ritz motels. Indeed there has been no showing, no documentation, to establish that respondent ever actually invested such a sum in all three motels, see *Matter of Shaw, Supra.*

From all the documentation submitted the respondents, S. N. Patel and H. S. Patel may be "straw men investors" working long hours for another.

From the testimony, I find that the respondents and their "partner" are now the only employees at the Stardust motel — having displaced a citizen operator there. Mrs. Patel has been performing the functions of a maid, and Mr. S. N. Patel has been displacing a United States citizen or lawful permanent resident as manager of the motel Stardust. No new jobs have been created at the Stardust.

I note that the Ritz and Texas motels, allegedly owned by one alien who has never been in the United States, and another alien who is a nonimmigrant, took a new jobs credit of $1,235.95 (Texas-Ritz) to offset income for Federal Income tax purposes, (I wonder if that was the intent of congress). The Stardust

motel for 1977 shows a Federal income tax loss of $1,205.12 (for each partner). The respondents, with their three alien children, show no taxable income on their federal tax return for the year 1977.

Under questioning, respondent S. N. Patel indicated that he intended to go the Canada when he applied at the American Consul in London, England, and when he arrived in the United States in August, 1976. However, his actions in the 30 days following his entry belie such intent. Based on careful observation of the demeanor of S. N. Patel, I find his testimony incredible that he had no preconceived intent to stay in the United States permanently by any means when he arrived here August 22, 1976. I find no concrete evidence that respondent ever put his funds into these motels, he may well be just an employee of either Gordhan Dayha, or R. V. Patel or someone else.

There was testimony that the former owner of the Ritz and Texas motels had only one full time employee there and there are 2 full time employees there (one replacing the former owners Mr. and Mrs. Knodle). At the Stardust there is no outside employee. This does not show that respondents are expanding job opportunitis in the United States. See *Matter of Ruangswang*, I.D. No. 2546, (BIA, 1976). Respondents are in direct competition with United States citizens or lawful permanent residents who are motel owner/operators. Respondents are engaged in labor where it has not been shown that there is any shortage of able, willing, qualified and available maids or motel managers in the Dallas, Texas area.

Respondents alleged investment fall short of meeting either investor standard between February 12, 1973 and the present.

I find that S. N. Patel has not established that he qualifies as an investor and thus exempt from the labor certification requirement of section 212(a)(14) of the Act. Respondents have failed to document their alleged investment. I also find that they do not merit the favorable exercise of discretion for adjustment of status under section 245 of the Act.

There has been no showing that respondents are statutorily barred from voluntary departure.

Based on all the foregoing the following order is entered:

ORDER: IT IS ORDERED that respondents application for adjustment as status to that of immigrants based on a claim to being investors is denied;

IT IS FURTHER ORDERED that in lieu of an order of deportation, the respondents be granted voluntary departure without expense to the Government on or before March 1, 1979 or any extension beyond such date as may be granted by the district director, and under such conditions as the district director shall direct.

IT IS FURTHER ORDERED that if either respondent fails to depart when and as required, the privilege of voluntary departure shall be withdrawn without further notice or proceedings and the following order shall thereupon become immediately effective: such respondent shall be deported from the United States to Canada on the charge contained in the Orders to Show Cause.

IT IS FURTHER ORDERED that if the aforesaid country advises the Attorney General that it is unwilling to accept such respondent into its territory, or fails to advise the Attorney General within three months following original inquiry whether or not it will accept such respondent into its territory, such respondent shall be deported to England or India.

James R. Smith
Immigration Judge

December 5, 1978
(date)

D-1

United States Department of Justice
Board of Immigration Appeals
Washington, D.C. 20530

May 6, 1980

Files: A20 969 651 — Dallas
A21 582 309

In re: GILLIAN ADELE *KALLENBERGER*
HANS WILHELM *KALLENBERGER*

IN DEPORTATION PROCEEDINGS
APPEAL

ON BEHALF OF RESPONDENTS: Harry J. Joe, Esquire
Suite 3400
Republic National Bank Building
Dallas, Texas 75201

ON BEHALF OF I & N SERVICE: Gerald S. Hurwitz
Appellate Trial Attorney

ORAL ARGUMENT: April 28, 1980

CHARGE:

Order: Section 241(a)(2), I & N Act (8 U.S.C. 1251(a)(2) — Nonimmigrants — Remained longer than permitted (both respondents)

APPLICATION: Adjustment of status (both respondents)

In a decision dated February 6, 1979, an immigration judge found the respondents deportable as charged, denied their applications for adjustment or status under section 245 of the Immigration and Nationality Act, 8 U.S.C. 1255, and granted them a period of voluntary departure in lieu of deportation. The respondents appealed. Oral argument was heard before the Board on April 28, 1980. The record will be remanded.

Because of serious problems with the transcript of the respondents' deportation hearing, the Appellate Trial Attorney for the Immigration and Naturalization Service at oral argu-

A20 696 651
A21 582 309

ment stipulated to a remand for a *de novo* hearing. The case will therefore be remanded to the immigration judge for a new hearing. All issues presented in this case are to be resolved at this hearing, with the usual rights of appeal.

ORDER: The record is remanded to the immigration judge for a *de novo* hearing.

Chairman

E-1

Supreme Court of the United States

No. A-1057

SHASHIKANT NARANBHAI PATEL
AND HASUBEN SHASHIKANT PATEL,

Petitioners

V.

IMMIGRATION AND NATURALIZATION SERVICE

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s).

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 19, 1982.

/s/ BYRON R. WHITE
Associate Justice of the Supreme Court of the United States

Dated this 8th
day of June, 1982.